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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ——— 71-393

ALPHONZO L. DOWELL and VIVIAN T. DOWELL,
Petitioners,

VERSUS

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Alphonzo L. Dowell and Vivian T. Dowell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 2, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Western District of Oklahoma.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 2, 1971. On September 1, 1971, Mr. Justice Blackmun granted an extension of 30 days, to October 1, 1971, in which to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

1. Whether an objection to the composition of the jury based upon the systematic exclusion from the petit jury panel of a racial group where the defendant is a member of the excluded group, presents a question of a right so fundamental that it cannot be deemed to be waived under the provisions of Rule 12(b)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C., if not presented before trial.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Rule 12(b)(2), Federal Rules of Criminal Procedure. Defenses and objections which must be raised.

> Defenses and objections based upon defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by making before trial. The motion shall include all such defenses and objections then available to the defendant, failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked because the petitioners were indicted for attempting to evade or defeat federal income taxes pursuant to 26 U.S.C. Section 7201. The petitioners, Dr. Alphonzo L. Dowell and Dr. Vivian T. Dowell, are both black professional people. Petitioner Alphonzo L. Dowell is in addition an Oklahoma City Councilman who has for some years held a highly visible position of leadership in the civil rights movement in Oklahoma City. In 1960 he commenced, on behalf of his son, the Oklahoma City School Integration case, which remains in litigation even to this day. In May of 1970 both petitioners were indicted on four counts charging them with attempting to evade or defeat the payment of taxes on their joint income earned during the years 1963, 1964, 1965 and 1966. They were convicted by a jury verdict in September of 1970; Alphonzo L. Dowell was sentenced to three years on each of four counts, the sentences to run concurrently; Vivian T. Dowell was sentenced to four years, the sentence suspended, and she was placed on probation. Although the Western District for the State of Oklahoma has a substantial number of registered black voters, the jury panel consisted entirely of whites, a highly disproportionate number of blacks on the jury panel being a consistent pattern in the District Court for the Western District of Oklahoma. No challenge was made to the method of jury selection either before or during trial by the petitioners' trial counsel. The issue of discriminatory practices in the jury selection process was raised for the first time by petitioners' appellate counsel (petitioner's trial counsel were not retained for the appeal) at the time

the case was docketed in the Court of Appeals for the Tenth Circuit. That appeal presented for review two issues: (1) that the government had failed to prove the necessary element of willfullness; (2) that defendants had not waived their challenge to the unconstitutional method of jury selection by failing to present it before or during trial. The petitioners' appellate counsel, on the latter issue, asked the Tenth Circuit to remand the case to the District Court for a determination in that court of the question of the systematic exclusion of blacks in the jury selection process. The Tenth Circuit affirmed the convictions on August 2, 1971.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS, IN CONSTRUING A FEDERAL RULE OF CRIMINAL PROCEDURE, SO MISAPPLIED A DECISION OF THIS COURT AS TO NOW CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION OVER THE FEDERAL COURTS.

This case presents an important problem under the Federal Rules of Criminal Procedure as to the proper construction of Rule 12(b)(2) which provides that objections based on defects in the institution of the prosecution must be made before trial or deemed waived. This Court has held that under certain circumstances Rule 12(b)(2) applies to objections based upon the method of selecting the petit jury panel or array. *Frazier* v. *U. S.*, 335 U.S. 497; *Shotwell Mfg. Co.* v. *U. S.*, 371 U.S. 341, 361-363. The *Frazier* case involved a challenge to a method of selection which resulted in a jury panel with an undue proportion of government workers and the unemployed by a defense counsel who had used his peremptory challenges to remove

those few jurors who were privately employed. The *Shotwell* case involved a corporation and two corporate officers convicted of tax evasion who after four years of inaction and with no showing of prejudice challenged an open and notorious method of selecting the petit jury array.

Lower Federal Courts have now, as the Tenth Circuit has here, see Appendix p. vi, construed the *Shotwell* decision to require that an objection, untimely under Rule 12(b)(2), to the method of jury selection be deemed waived even where that objection is to the composition of a jury panel based upon the systematic exclusion of a racial group in cases affecting the liberty of defendant who is a member of that racial group. *Fernandez* v. *Meir,* 408 F.2d 974, 976 (C.A. 9); *Penkney* v. *U. S.,* 380 F.2d 882 (C.A. 8).

We recognize the strong interest in the promulgation of the orderly administration of justice underlying Rule 12(b)(2), but urge that some rights are so fundamental to our conception of justice that their denial may not be deemed waived as a matter of procedural convenience, a principle which this Court has often recognized. *Johnson* v. *Zerbst,* 304 U.S. 458; *Carnley* v. *Cochran,* 369 U.S. 506. A black defendant has no right to a trial by a jury composed in any part by members of his race, but he has a very fundamental right to a trial by a jury whose all-white composition is not the product of a method of jury selection which systematically excluded blacks from the jury panel or array.

For nine decades this Court has held that a conviction cannot stand based upon an indictment from a grand jury

or a verdict of a petit jury from which members of the defendant's race were systematically excluded. *Strauder* v. *West Virginia,* 100 U.S. 303; *Pierre* v. *Louisiana,* 306 U.S. 354; *Whitus* v. *State of Georgia,* 385 U.S. 545. Here petitioners' appellate counsel asked the Tenth Circuit to remand the case to the District Court to afford petitioners the opportunity to now in that court offer proof that the apparent disproportion of blacks on the jury panels in the District Court for the Western District of Oklahoma is in fact the product of an intentional and systematic exclusion of blacks from the jury selection process, creating *per se* a constitutional infirmity in petitioners' convictions. The alternative open to petitioners is to offer this same proof in that same court after Alphonzo L. Dowell has been incarcerated, in a proceeding for a federal post-conviction relief.

During the same term as that in which the *Shotwell* case was decided, this Court expressed its philosophy on the adequacy of that alternative as a remedy. *Fay* v. *Noia,* 372 U.S. 391, 440-441. Speaking of state prisoners who ultimately gain their freedom by means of federal habeas corpus, this Court there said:

> "Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought never the less to languish in prison."

Surely, those same fair-minded persons would no more contend that one deprived of his liberty through the de-

nial of a fundamental constitutional right which denial was not challenged until after the verdict of conviction ought, because of his failure to meet the requirements of a procedural rule, to be incarcerated to await the slow-grinding machinery of post-conviction relief rather than being permitted to attack that denial after the verdict.

The question this Court must now decide is whether *Shotwell Mfg. Co.* v. *U. S., supra,* may be fairly construed by lower federal courts to apply to *all* objections to jury composition which are untimely by the provisions of Rule 12(b)(2) even where the objection is based upon the systematic exclusion of the defendants' racial group from the jury panel or array.

2. THE QUESTION IS ONE OF FAR-REACHING IMPORTANCE WHICH HAS NEVER BEEN SETTLED BY THIS COURT.

If petitioners because of the technicalities of a procedural rule are not permitted at this time to attack the unconstitutional method of jury selection in the District Court for the Western District of Oklahoma, it is not they alone who will suffer the injury of the consequence. The systematic and intentional exclusion of groups from participation in the jury system shakes the foundations of our society itself. In *Ballard* v. *U. S.*, 329 U.S. 187, 195, this Court said:

> "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large and to the democratic ideal reflected in the prccesses of our courts."

It is submitted that an injury of this magnitude should be brought to light and halted at the earliest possible time in a motion made after the verdict or in an attack on direct appeal, rather than suppressed in the service of a procedural rule to await its remedy through the lengthy process of a proceeding for post-conviction relief.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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September, 1971

APPENDIX

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Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1971

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	Nos. 618-70 and 619-70
ALFONZO L. DOWELL and VIVIAN T. DOWELL, Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

William R. Burkett, United States Attorney, for Plaintiff-Appellee.

John W. Walker and Philip E. Kaplan of Walker, Rotenberry, Kaplan, Lavey & Mays (Norman C. Amaker, Of Counsel, on the brief) for Defendants-Appellants.

Before HILL, SETH and DOYLE, Circuit Judges.
DOYLE, Circuit Judge.

[APPENDIX]

Defendants-Appellants, Alfonzo Dowell and Vivian Dowell, husband and wife, were convicted by a jury in the United States District Court for the Western District of Oklahoma of attempting to evade or defeat federal income taxes pursuant to 26 U.S.C. § 7201.[1]

1. It is here contended by the appellants that the judgment should be reversed and the cause remanded because the trial court erred in denying their motions for judgment of acquittal because of the failure of proof in support of the essential element of willfulness.

2. There existed racial discrimination in the selection of the jury. The defendants are black, but were tried by an all white jury. It is said that while this matter was not raised at trial, it was not effectively waived.

According to the evidence, Dr. Alfonzo L. Dowell is an optometrist, and his wife, Dr. Vivian T. Dowell, is a dentist. They both practice their professions in a clinic in Oklahoma City which was built by them in 1956 and financed through a federal savings and loan association. They have three children, all of whom were in school at the time of trial, and the family lives in a home completed in 1959 and purchased for a total contract price of between $42,000 and $44,000 ($32,000 of which was financed).

During the years covered by the indictment, 1963-1966, appellants' tax returns were prepared by an accountant, one W. T. Avery, from information furnished by appellants. The information furnished to Mr. Avery consisted of their receipt books to show professional income, a summary schedule of rental receipts to show rental income,

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[1] 26 U.S.C. § 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

their check stubs from two or three bank accounts[2] and selected cancelled checks to show their expenses. On the basis of this information alone, it appears that the tax returns in question were correctly prepared by Mr. Avery.

For the years covered by the indictment, appellants' tax returns reported income as follows:

Year	Gross Income	Taxable Income	Income Tax
1963	$ 39,682	$289.99	$58.00
1964	38,888	-0-	-0-
1965	37,509	-0-	-0-
1966	43,807	21.28	2.98
Totals	$159,786	$311.27	$60.98

After the Government began its investigation of appellants' taxes in 1968, appellants filed amended tax returns for the years in question reporting income as follows:

Year	Gross Income	Taxable Income	Income Tax
1963	$ 50,165.00	$10,080.00	$ 2,579.00
1964	56,133.00	15,055.00	3,703.76
1965	49,169.00	9,331.00	2,111.00
1966	52,428.00	8,794.58	2,027.38
	$207,895.00	$43,260.58	$10,421.14

Thus, it is beyond question that appellants understated their income by at least $48,000 during the four years. The inquiry then is whether they did so willfully and whether

[2] Appellants maintained three bank accounts. Dr. Alfonzo Dowell's account, used by him to pay his business and personal expenses, Dr. Vivian T. Dowell's account, used by her to pay her business and personal expenses, and the Dowell Building Fund account, used to pay expenses chargeable to both appellants. Deposits to these accounts were not made from particular sources.

the Government's evidence was sufficient for the jury to so conclude and for the trial court to have denied appellants' motions for judgments of acquittal.

The attempt to evade or defeat the tax must be a willful attempt. The Government must prove beyond a reasonable doubt that there was an attempt made voluntarily and intentionally, and with the specific intent to keep from the Government a tax imposed by the tax laws. The accused must be shown by the evidence to have been under a duty to pay the Government and must be shown to have known that it was his legal duty to pay. Thus, the evidence must establish beyond a reasonable doubt a wrongful intent to evade the tax. Hargrove v. United States, 67 F.2d 820 (5th Cir. 1933). See also McCarty v. United States, 409 F.2d 793, 795 (10th Cir. 1969); Cf. Spies v. United States, 317 U.S. 492 (1943). Such intent may be proved by circumstantial evidence, upon which reasonable inferences can be based. Swallow v. United States, 307 F.2d 81, 83 (10th Cir. 1962); cf. Haskell v. United States, 241 F.2d 790, 793 (10th Cir. 1957).

Courts have held various types of evidence under various types of circumstances to support a reasonable inference of willfulness. For example, the most applicable statement by the Supreme Court in Holland v. United States, 348 U.S. 121, 139 (1954), regarded a pattern of underreporting to be sufficient:

> The petitioners contend that willfulness "involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income." This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand.

In the case at bar, there is strong evidence in support of an inference of willfulness.

1. The amended returns filed for the years in question reveal a consistent pattern of underreporting large amounts of income. Further, during the same period of time, the deposits to defendants' various checking and savings accounts totaled some $60,000 more than was initially reported as gross income.

2. The defendants spent $67,000 for non-deductible expenditures, including reduction of their mortgage indebtedness by more than $28,000, life insurance premiums of $15,949, $4,461 in private school tuition for their children, the purchase of two new Buick automobiles, and $3,344 for household held—while reporting $311 in taxable income.

3. They were also making payments, from 1958 through 1967, on a building which cost $60,000.

From these large nondeductible expenditures, it may be inferred that appellants knew that their taxable income was greater than that reported.

Evidence of intent to evade is also found in the extensive use of cash by the defendants—cash which apparently was not withdrawn from their bank accounts, but rather had never found its way into a bank account. In 1965, for instance, the appellants wrote checks to cash totaling $210, yet paid $1,500 in cash to a bank on a loan. Over the four year period the appellants wrote only $1,400 in checks for groceries to feed a family of five, an average of $6.73 per week. Although appellants never had fewer than two automobiles, they never wrote any checks for gasoline and oil.

Since the appellants did not keep records of income in their receipt book which they gave to their accountant for income tax purposes, it may be reasonably inferred by a jury that their failure to include in those receipt books

such substantial amounts of income as were shown here pointed to something more than mere inadvertence or negligence.

We conclude then that the evidence in the record before us fully justified the submission of the case to the jury, and the trial court properly denied appellants' motions for judgments of acquittal. Appellants' defenses of ignorance in tax matters and complete reliance on their accountant presented issues of fact properly determined by the jury.

We need not consider on its merits appellants' contention that their convictions should be reversed and the cause remanded for new trial because the issue of racial discrimination in the jury selection process was not raised below nor effectively waived by the defendants. Appellants do not *now* allege that the jury panel was in fact improperly selected, and if their contention *were* to be construed by this Court as a positive assertion of improper selection (which it is not), it is doubtful that they would not be deemed to have waived this objection, for purposes of appellate review, by failure to present such objection pursuant to Rule 12(b), Fed.R.Crim.P. Shotwell Mfg. Co. v. United States, 371 U.S. 341, 361-63 (1963). If appellants do have a meritorious constitutional challenge to the selection of the jury panel or array, it would be more properly raised in a collateral proceeding. See Fernandez v. Meier, 408 F.2d 974 (9th Cir. 1969) (holding that in a petition filed pursuant to 28 U.S.C. § 2255, the issue of waiver must be determined according to the standards of Fay v. Noia, 372 U.S. 391 (1963), rather than Rule 12(b)(2).

The judgments of conviction herein are affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-393

ALPHONZO L. DOWELL AND VIVIAN T. DOWELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were indicted and convicted in the United States District Court for the Western District of Oklahoma on four counts of willfully attempting to evade or defeat federal income taxes for calendar years 1963–1966, in violation of Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201). Petitioner Alphonzo L. Dowell was sentenced to three years' imprisonment on each count, the sentences to run concurrently, and his wife was placed on probation with imposition of sentence reserved. The court of appeals affirmed (Pet. App. (i–vi)).

447-810—71

The single question raised here is whether the decision of the court below should be reversed and the cases remanded to the district court for a hearing on the question of whether members of the racial group of which petitioners are members were systematically excluded from the petit jury panel (Pet. 2). Neither petitioners, both educated professional people, nor their attorneys, objected in the district court to the method of selecting jurors. In the court of appeals, where petitioners first attempted to raise the question of exclusion of blacks from the jury, petitioners did not assert that the method of selection was in fact improper but merely requested a remand to determine if there might have been systematic exclusion (Pet. 4, Pet. App. vi).

1. Factually unsupported suspicion that a basic constitutional right may have been denied presents a question which an appellate court should not be required to face when raised before it for the first time. *Frazier* v. *United States*, 335 U.S. 497, 503. As noted by the court of appeals (Pet. App. vi), petitioners' grievance is one especially suited for resolution under 28 U.S.C. Section 2255. See, *e.g.*, *Fernandez* v. *Meier*, 408 F. 2d 974 (C.A. 9). Under Section 2255 the district court will have the opportunity to receive evidence and rule on the two essential issues of fact involved: (1) Did petitioners, for purposes such as trial strategy or other considerations, effectively waive objection to the jury makeup under the standards announced in *Fay* v. *Noia*, 372 U.S. 391, 438? See also *Whitus* v. *Balkcom*, 333 F. 2d 496 (C.A. 5). (2)

Have petitioners met their burden of proving the existence of purposeful discrimination in the jury selection process? See *Whitus* v. *Georgia,* 385 U.S. 545, 549–550.

2. This Court is not now in a position to evaluate petitioners' case with respect to either essential question of fact, and a reversal of the decision of the court of appeals in this case would bring substantial disruption to the existing system of trial and appellate review. Rule 12(b)(2), Fed. R. Crim. P., would be rendered meaningless and harmful opportunities for delay based on mere assertion would be created.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

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In the
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-393

ALFONZO L. DOWELL and VIVIAN T. DOWELL,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order granting the Petition for Writ of Certiorari. Mr. Justice Byron R. White, Circuit Justice, by order dated December 14, 1971, suspended the order of this Court denying the Petition for Writ of Certiorari issued December 7, 1971.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED ON THE GROUNDS THAT INTERVENING CIRCUMSTANCES OF SUBSTANTIAL AND CONTROLLING EFFECT HAVE OCCURRED SINCE DENIAL OF THE PETITION FOR WRIT OF CERTIORARI.

THERE IS NOW EVIDENCE THAT THE PETITIONERS' COUNSEL RAISED AN OBJECTION AT THE TRIAL LEVEL ON THE METHOD OF SELECTION AND THE COMPOSITION OF JURIES IN THE WESTERN DISTRICT OF OKLAHOMA.

The United States Court of Appeals in its opinion in this matter issued August 2, 1971, and reprinted in the Appendix to the Petition for Writ of Certiorari, denied the appeal on the basis that petitioners' counsel at the trial did not raise the issue of the method of selection and composition of the juries in the Western District of Oklahoma. The Court ruled that this objection was waived unless timely presented. However, counsel for the petitioners has since learned that an objection to the composition and selection of the jury was timely made in the trial court below.

At the trial the petitioners were represented by three attorneys. One of them, Archibald Hill, a Black State Representative, was to make the objection to the method of selection of the juries in the Western District of Oklahoma and the composition of the jury. This had been requested of him by the petitioners. Counsel for the petitioners has since obtained knowledge from both Mr. Hill and Mr. Robert B. Milston, one of the petitioners' other lawyers at the trial, that Mr. Hill did, in fact, make such objection out of the hearing of the jury and that quite likely such objection was not picked up by the court reporter. See Appendix B and Appendix C to this Petition. The evidence is that the objections were rejected summarily without hearing.

In their Appeal before the United States Court of Appeals, the petitioners were represented by Mr. Norman Ameker of the New York City Bar and Mr. John Walker of the Arkansas Bar. Petitioners' trial counsel did not represent them on Appeal. When petitioners prepared their Petition for Writ of Certiorari to this Court they retained still other counsel, Stephen Jones, and were no longer represented by counsel who had represented them in the Court of Appeals. Only after counsel for the Supreme Court appearances had been retained was an effort made to compare the transcript of the evidence presented at the trial with the recollection of the attorneys present. As the affidavits attached here clearly show, it is the clear recollection and memory of the petitioners themselves and of Archibald Hill and Robert B. Milston, both attorneys for petitioners at the trial, that the objections were timely made and summarily overruled by the court without a hearing.

PROPOSITION I

THIS COURT SHOULD GRANT THE PETITION ON THE GROUNDS THAT THE USE OF VOTING LISTS ALONE IN THE WESTERN DISTRICT OF OKLAHOMA OR IN OTHER DISTRICTS OF SIMILAR CHARACTERISTICS, ARBITRARILY AND DISCRIMINATORILY EXCLUDES A LARGE NUMBER OF BLACKS FROM THE JURY SELECTION PROCESS FOR FEDERAL COURTS.

The Jury Selection and Service Act of 1968, 28 U.S.C. §1861 provides:

> "It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to a Grand and Petit Jury selected at

> random from a *fair* cross section of the community in the District or Division wherein the Court convenes. It is further the policy of the United States that *all citizens* shall have the opportunity to be considered for service on Grand and Petit Juries in the District Courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose." [Emphasis supplied.]

Decisions of this Court, *Strauder* v. *West Virginia,* 100 U.S. 303, 25 L.Ed. 664 (1880); *Ex Parte Virginia,* 100 U.S. 339, 25 L.Ed. 676 (1880), and the Mandate of the Jury Selection and Service Act of 1968, make it clear that a defendant in a criminal case is entitled to be indicted and judged by a jury that is (1) a "fair" cross-section of the community in which he is being tried and (2) that "all citizens" shall have the opportunity to be considered for service. While we agree that there is no requirement that every jury panel proportionately represent every recognized group in a District or Division wherein the court is held, the law is clear that where there is discrimination in the selection of the jury panel such as to discriminate against the selection of Negroes (*Whitus* v. *Georgia,* 385 U.S. 545 at 551, 87 S.Ct. 643 at 647, 17 L.Ed.2d 599 at 604 (1967)), certain economic groups, such as wage earners (*Labat* v. *Bennett,* 365 F.2d 698, 5th Cir. 1966, *cert. denied* 386 U.S. 991, 87 S.Ct. 1303, 18 L.Ed.2d 334 (1967)), or women (*Hoyt* v. *Florida,* 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961)), the defendant is denied his rights to due process under the Fifth Amendment.

The Jury Selection and Service Act provides that among the sources of names to be considered in compiling

the jury lists are voter registration lists, lists of actual voters or other official lists of eligible voters of the political subdivision within the District or Division. But the Act also provides that in those Districts or Divisions where voter lists do not constitute a fair cross-section of the community, the Act specifically authorizes the use of other lists in addition to the voter lists to insure the representative cross-section. Title 28 U.S. Code §1863(b)(2). Other sources for names, however, are not used in the Western District (see Appendix A).

It is the contention of the petitioners herein that the use of voting lists, lists of registered voters and/or lists of actual voters violates the Fifth Amendment Clause of the Constitution of the United States in Federal Courts because it excludes a disproportionately large number of Blacks. This is particularly true, we submit, in the Western District of Oklahoma. Moreover, the error of trial court was that it denied the defendants a hearing on their objection to the method of selection and composition of the jury. The defendant in a criminal case is entitled to present evidence in support of a motion challenging the method and composition of the jury. 28 U.S. Code 1867(e), *et seq.*

The decisions of this Court and other Federal Courts are clear. When the racial composition of the voter registration lists is substantially different from that of the community, a jury panel drawn from the registration lists is presumptively improperly drawn and the prosecution has the burden of showing that it represents a fair representative cross-section of the community. *Broadway* v. *Culpepper*, 439 F.2d 1253 (5th Cir. 1971). In *Preston* v. *Mande-*

ville, 428 F.2d 1392 (5th Cir. 1970), a case involving state proceedings, the Fifth Circuit determined that 29.3 per cent of the population in the District in which the jury was selected was Black but less than 15 per cent of the persons on jury rolls were Black. The Fifth Circuit held that this was a *prima facie* case of discrimination. We submit that on proper showing the same or similar showing could have been made for the Western District of Oklahoma and that it was error of the trial court to deny the defendants (both Black) the opportunity to challenge and present evidence in support of their contentions. It was not necessary, for example, that the defendants below prove that the discrimination against Blacks was intentional. (*U. S.* v. *Bryant* (D.C. Maine, 1968), 291 F.Supp. 542, *affirmed* 420 F.2d 564). However, the burden of proof, of course, is on the defendant. *U. S.* v. *Bryant, supra.* Both this Court and the Congress though have put a heavy burden on the trial court to make certain that the method of jury selection represents a fair cross-section of the population in the district, *Rabinowitz* v. *U. S.,* 366 F.2d 34 (5th Cir. 1966), and it has been said that the principal duty upon the Federal District Courts is to structure a system that avoids improper exclusion of identifiable groups within the community. *U. S.* v. *Leonetti,* 291 F.Supp. 461 (D.C. N.Y. 1968).

The use of voting lists as the sole source of names of potential jurors is of course constitutionally permissible unless there is a showing of discrimination in compiling such voter registration lists or if the lists themselves do not adequately represent the community. (*U. S.* v. *Parker,* 428 F.2d 488 (8th Cir. 1970), and *Rabinowitz* v. *U. S., supra*). There is an absolute command that the jury be

drawn from a cross-section of the community and be truly representative of the community, *U. S.* v. *Bryant, supra.*

As indicated above, of course, the burden of proof is on the defendant who challenges the jury selection. However, a statistical disparity from reasonable proportionate percentage with regard to racial distribution on juries may carry the burden of proof and establish a "prima facie case" of systematic exclusion of a group or class of qualified citizens, the prosecution would then have the duty of rebutting that evidence.

However, we again emphasize that the trial court denied summarily the objection by defendants' attorney, Archibald Hill, without allowing the defendants the opportunity to present evidence.

PROPOSITION II

THIS COURT SHOULD GRANT THE PETITION FOR REHEARING BECAUSE BLACK PERSONS, CULTURALLY DIFFERENT, AND PERSONS OF LOWER ECONOMIC STATUS, HAVE BEEN SYSTEMATICALLY EXCLUDED AND ARE SUBSTANTIALLY UNDER-REPRESENTED BY THE PRESENT USE OF VOTER LISTS IN THE WESTERN DISTRICT OF OKLAHOMA AND IN OTHER FEDERAL DISTRICT COURTS UNDER THE REQUIREMENT OF THE JURY SELECTION AND SERVICE ACT OF 1968.

The use of voter lists without supplementation, as did the rejected intelligence tests, results in the disproportionate exclusion of identifiable groups, specifically racial minorities and lower income citizens, and consequently produces a master panel which is not representative of the community at large, in violation of the due process and

equal protection clauses of the Fourteenth Amendment. Therefore, the jury venire must be quashed in the instant case.

Although popular conception is otherwise, there has been a substantial increase in non-voting and in occasional voting in this country in the last three quarters of a century. (See Walter Burnham, "The Changing Shape of the American Poltical Universe," 59 *American Poltical Science Review*, No. 1 (March 1965), page 22.) At pages 22-23 Burnham states:

> "The late 19th-century voting universe [in the United States] was marked by a more complete . . . voting participation among the American electorate than ever before or since."

Burnham sets forth the following percentages:

	Core voters	*Peripheral voters*	*Non-voters*
Late 19th Century	66%	10%	24%
Present day	44%	16%	40%

Core voters are those who vote regularly, while peripheral voters are those who vote occasionally. These statistics show, as Burnham states, a "political apathy on a scale quite unknown anywhere in the Western world."

All studies on the subject show that the non-voters are not randomly distributed in the adult population. Social scientists have found that a variety of differences exists between voters and non-voters, psychological, attitudinal and demographic. Seymour Martin Lipset, Professor of Sociology at Harvard University, formerly of the University of California, Berkeley, summarizing a variety of recent voting studies, shows that the following groups tend

to vote at a higher rate: men (as opposed to women), those with a higher level of education, those aged 35-55 years, married persons, higher status persons, and members of organizations. Businessmen, white collar workers and government workers vote at a higher rate than do unskilled workers, servants and service workers, amongst which black persons and minority groups are heavily represented. (Lipset, *Political Man*, Anchor Books, Garden City, N.Y., 1963, pp. 187-189; see also V. O. Key, *Politics, Parties and Pressure Groups*, Thomas Y. Crowell Co., New York, 1958, pp. 633-634.)

A recent basic study by Angus Campbell concludes that Catholic religious affiliation and higher income are significant attributes of the voter. (Campbell, *et al.*, *The Voter Decides*, Row, Peterson & Co., Evanston, Ill., 1954, pp. 70-73.)

Precise estimates of the variation in voter turnout rate along these various factors are available *(Id.)* and show serious under-representation by the groups amongst which black persons are heavily over-represented. These findings are unequivocal by normal measurement standards of the social and statistical sciences.

The black community in the United States and in Oklahoma County is distributed along many of the dimensions listed above in quite different proportions than in the white community.

Blacks have a lower overall level of formal education, lower occupational level, lower income, and a lower proportion of Catholics than do whites. It has also been found that income makes more of a difference in voting turnout

for Negroes than it does for whites. (See Edward Litchfield, "A Case Study of Negro Political Behavior in Detroit," 5 *Public Opinion Quarterly*, No. 2 (June 1941), page 269.)

In the classic study referred to *supra*, *The Voter Decides*, Campbell presents the following turnout estimates by race for two recent presidential elections:

	Negro	*White*
1948	36% (61)	66% (585)
1952	33% (157)	79% (1453)

Although turnout rates vary election to election, the cross-racial differences remain strong: an average for these two elections of a 38 per cent lower Negro turnout.

Although the above stated data included the southern region, where Negro voting is of course far lower than in the west and north, the data from other studies bear out Lipset's conclusion that voting turnout of northern Negroes is lower than that of northern whites. (Lipset, *Political Man, supra*, p. 209; see also Lipset, *et al.*, "The Psychology of Voting: An Analysis of Political Behavior" in Gardner Lindzey (ed) *Handbook of Social Psychology*, Addison-Wesley Publishing Co., Inc., Reading, Mass. 1954, Vol. 2, p. 1132; see also Litchfield's case study of Negro political behavior in Detroit 1930-40, 5 *Pub. Opinion Quarterly, supra*, at page 268, and Litchfield, *Political Behavior in a Metropolitan Community* (1941).) For the five elections studied in the Litchfield Detroit study, the average Negro turnout of registered voters was 54.3 per cent and the average native white turnout was 75.1 per cent; it must be noted that failure to vote in a general election removes the voter from the registration lists.

These findings are confirmed by Oscar Glantz' study of the Negro voter in northern industrial cities. (See Glantz, "The Negro Voter in Northern Industrial Cities," 13 *Western Political Quarterly*, No. 4 (December 1960), pp. 999-1000.)

Glantz examined the 1948, 1952 and 1956 presidential ballots in Chicago, Cincinnati, Cleveland, Detroit, Kansas City, Pittsburgh and St. Louis. His results showed the average Negro voting rate for the seven cities over the three elections to lag far behind the overall voting rate. The average Negro rate of turnout of registered voters was 73.6 per cent and for the total registered population 83.4 per cent. These statistics must be further modified by the fact that Negroes and whites are not registered at the same rate. The effect of the varying sufferage laws in the north results in the following statistics, indicating an enormous cross-racial difference of 30 per cent:

Frequency of past voting	*Negro*	*White*
(voted in all or (most elections	43%	73%
(voted in some or (no elections	57%	27%
number of cases	(111)	(2268)

The available data indicate that in the north Negro voting lags at least 20 per cent behind white voting, and probably 30 per cent behind it. About two-fifths of eligible northern Negroes vote at least most of the time, compared to about seven-tenths of their white counterparts. Negro

non-voting is not strictly voluntary. Negroes forced to move while job hunting will often not meet residence requirements for voting. Burnham's study cites several of the well known features of the American policy that effectively make many persons involuntary non-voters today. (Burnham, *op. cit.*, pp. 12, 26, 22-28.) And for a description of the plight and lives of urban Negroes which contribute to their non-voting behavior, see Report of the National Advisory *Commission on Civil Disorders*, Bantam Books, N.Y. 1968, an exhibit now filed with this Court.

The higher negative contact with the law, as defendants, which characterizes the plight of the blacks in the urban ghetto also disqualifies them from voters' lists and thus from jury service.

Some special factors which should be noted are that fewer people vote in off years (see Key, *op. cit.*, pp. 623, 627; Burnham, *op. cit.*, p. 10), and thus the current Oklahoma County voter lists, drawn as they are from the 1966 or 1967 elections, make the present juror universe even less representative than usual. The findings presented from eastern and midwestern cities herein hold true for Oklahoma County and the southwest; see the analysis in "The Negro Voter in the Far West," published by Loren Miller in 26 *The Journal of Negro Education*, No. 3 (summer 1957), page 263, wherein the author shows that both registration and voting of Negroes have lagged in Oklahoma and in the rest of the southwest.

PROPOSITION III

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SELECTION PROCESSES UTILIZED BELOW AND IN OTHER FEDERAL DISTRICT COURTS, SYSTEMATICALLY PRODUCES TOTAL EXCLUSION OF DEFENDANTS' PEERS, SUBSTANTIAL UNDER-REPRESENTATION OF BLACK AND POOR PERSONS, A TRIAL JURY NOT REPRESENTATIVE OF THE COMMUNITY, AND THESE PROCESSES AND RESULT DEPRIVE DEFENDANTS OF AN IMPARTIAL JURY AND A FAIR TRIAL.

The courts have long since recognized under-representation as presenting the same constitutional problem and effecting the same denial of constitutionally guaranteed rights as total exclusion of a race or significantly identifiable group. *Anderson* v. *Alabama,* 366 U.S. 208, 81 S.Ct. 1050 (1961) *rev'g per curiam* 270 Ala. 575, 120 So.2d 414 (1960), and *Cassell* v. *Texas,* 339 U.S. 282, 70 S.Ct. 629 (1950). In *Anderson* appellant alleged under-representation of Negroes on jury venires, and in *Cassell,* reversing on other grounds, the Court said that if the jury commissioners had limited Negroes to one on each (grand) jury, such practice was unconstitutional.

A large and unexplained disparity between the proportion of Negroes on venires and in the population generally is unlikely to result from random selection. When the disparity between Negroes in the adult population and those actually appearing on trial juries becomes so large that the prosecution may exclude all or all but one or two Negroes from the trial jury, in an area with a large Negro population, the procedure by which this actuality comes to pass must be re-examined whether or not they have previously been sanctioned by law or custom.

The constitutional right to a representative jury, that is, a jury representative of the community, does not mean that every jury shall mirror the community, but only that the system for selecting juries shall be specifically designed to produce juries which are a reasonable cross-section of its significant elements. See, Kuhn, "Jury Discrimination: The Next Phase," 41 So. Cal. L. Rev. 235, 245 (1968). In this context, the word "selection" denotes the choice of, or the system for choosing which individuals are made eligible for jury duty, are called for jury service, and actually sit on juries. The word "discrimination" denotes a process which unreasonably includes members of one group or unreasonably excludes members of another.

A defendant is denied a hearing by an impartial tribunal if his jury is biased against him, whether from racial prejudice,[1] publicity surrounding the trial, fear or other reasons. When the bias is racial, the black defendant runs a greater risk of conviction, of conviction of a higher degree of crime, and of severe punishment than do members of the community's dominant white class. (See, *e.g.*, *Billingsley* v. *Clayton*, 359 F.2d 13, 15-16 (5th Cir. 1966); H. Kalven and H. Zeisel, *The American Jury*, 210-11 (1966);

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[1] The United States Supreme Court, federal and state cases prohibiting exclusion of a racially or significantly identifiable group from jury panels do not rest upon an explicit finding that white persons are racist or prejudiced against Negroes. Now, following the official findings of the Kerner Report by the President's official National Advisory Commission, even more stringent controls of the discriminatory *result* are required. If 7 out of 10 white persons or any percentage even approaching that figure were racially biased against the defendant, a fair trial could not be had as the result of any selection process which systematically, through a series of steps, from use of voters' roll through peremptory challenge, substantially underrepresented black people on the actual trial jury.

G. Myrdal, *An American Dilemma,* 550-54 (1962, 2d Ed.); J. Greenberg, *Race Relations and American Law,* 334-37 (1959); Broeder, "The Negro in Court," 1965 *Duke L. J.* 19, 23; Note, "The 'Blue Ribbon' Jury," 60 *Harv. L. Rev.* 613-14 (1947).)

Prejudice operates to incline the jury to believe ill of the defendant and to disbelieve his testimony and those of black witnesses for the defense, especially when their testimony conflicts with that of white prosecution witnesses. (See Myrdal, *supra,* at 550-52; Broeder, *supra,* 1965 *Duke L.J.* 60 *Harv. L.R.*,[2] Tucker, "Racial Discrimination in Jury Selection in Virginia," 52 *Va. L. Rev.* 736, 742-44 (1966).)

Challenges for cause cannot keep juries free from unconscious prejudice or from prejudice which the venireman, through embarrassment or otherwise, is unwilling to admit publicly on *voir dire. Irvin* v. *Dowd,* 366 U.S. 717, 728, 81 S.Ct. 1639 (1961).[3] See, also, Broeder, "Voir Dire Examination: An Empirical Study," 38 *So. Cal. L. Rev.* 503, 523 (1965), concerning the difficulty of ascertaining both unconscious and wilfully withheld attitudes of racism through ordinary techniques of *voir dire.*

The law contemplates that in finding facts, individual jurors will make like inferences and reach like conclusions in like situations, regardless of who the parties are. This cannot be the case if there is prejudice in one population

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[2] Where jury deliberations have become known, overt prejudice toward blacks has been revealed (1965 *Duke L. J.* 21-24).

[3] "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." (Opinion of the Court, per Mr. Justice Clark, 81 S.Ct. at 1645).

group against another, and the fact finding process is hampered further if members of the prejudiced group have an excessive impact through over-representation on juries. (Broeder, *supra*, 1965 *Duke L. J.* at 22-24; Tucker, *supra*, at 742-45; and note, for example, that the authors of the 1890 Mississippi Constitution believed Negroes to be "given rather to furtive offenses than to the more robust crimes of the whites." (*Ratliff* v. *Beale*, 74 Miss. 247, 266, 20 So. 865, 868 (1896)).

Since jury discrimination tends to exclude Negroes and other disfavored groups, the result is to increase the amount of prejudice against such groups on juries so that the prejudice is even more concentrated on juries than in the general population.

The fair trial thus depends not upon whether Negroes are excluded by way of original selection from the voter lists, or by way of the jury commissioner's excuses for employers' convenience, or because as wage-earners they cannot afford to serve, or because they are challenged peremptorily, but upon whether Negroes actually serve on the trial jury itself in reasonably proportional percentages of their representation in the adult population.

In *Anderson* v. *Alabama*, 366 U.S. 208, 81 S.Ct. 1050 (1966), *supra*, the Court summarily reversed a state court finding of no discrimination where 10 per cent of the veniremen were Negro in a county where more than half of those eligible were Negro. In *Whitus* v. *Georgia*, 385 U.S. 545 (1967), the Court reversed a conviction where 42 per cent of the eligible population, 27 per cent of the taxpayers from whom jury lists were drawn, and 9 per cent of the

lists themselves were Negro, finding these figures under the circumstances in question to constitute a *prima facie* case of discrimination.

In *Mitchell* v. *Johnson*, 250 F.Supp. 117 (Ala. 1966), the Court held that the "wide disproportion" of a jury list, 35.7 per cent Negro in a county whose population was 82 per cent Negro, required the state to explain its origin as non-discriminatory (which the state failed to do). The Court of Appeals for the Fifth Circuit has described disproportionate representation giving rise to *prima facie* cases of discrimination in terms of "significant discrepancy" and "very decided variations" (*Davis* v. *Davis, supra; Labat* v. *Bennett*, 365 F.2d 698, 712 (5th Cir. 1966), *cert. den.* 386 U.S. 991, 87 S.Ct. 1303 (1967); *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53, 67 (5th Cir. 1962).

Voter lists which are themselves a product of discrimination of an identifiable class may not constitutionally be used as sole sources of jurors. *United States ex rel. Goldsby* v. *Harpole*, 263 F.2d 71, 78 (5th Cir. 1959); *White* v. *Crook*, 251 F.Supp. 401, 404-05 (Ala. 1966); *Harper* v. *State*, 251 Miss. 699, 171 So.2d 129 (1965). The use of voter registration lists has been upheld in Boston and New York because those not registered were not shown to constitute a racial, economic, political or other identifiable group. *United States* v. *Bowe*, 360 F.2d 1, 7 (2d Cir. 1966); *Gorin* v. *United States*, 313 F.2d 641 (1st Cir. 1963); *United States* v. *Greenberg*, 200 F.Supp. 382 (S.D. N.Y. 1961).

The existence of an identifiable minority is considered a question of fact. *Hernandez* v. *Texas*, 347 U.S. 475, 74 S.Ct. 667, *supra*. The poor have been judicially declared to

be a cognizable class. *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956).

A recent study of the problem by C. A. Lindquist, in "An Analysis of Juror Selection Procedure in the United States District Courts," 41 *Temple L. Q.* 32 (1967), wherein the writer analyses the fact that in 1964, out of a voting age population throughout the nation of 114 million, about 80 million were registered. Residence requirements were the most severe legal restriction upon registration, resulting in an estimated eight million disenfranchised in 1960. A large proportion of these were from lower class, cultural minorities, such as migrant farm workers or southern blacks who had recently immigrated to northern cities.

Intimidation and apathy, which are also related to racial and socio-economic factors, were largely responsible for the remaining failures to register. Lindquist expressed great doubt that voter registration lists without supplementation were capable of producing representative juries in view of the fact that of the 30 million people excluded from the voter registration lists, a disproportionate number were members of the lowest socio-economic strata of society.

Whether or not the factors which account for low Negro registration may be attributed to historic and/or continuing discrimination, or economic pressures affecting transcience, or, even, *arguendo*, laziness or hostility, no operative factor—even the deliberate mechanism of not registering to vote in order to avoid jury service—can be deemed sufficient to deprive the defendant of his constitutional right to a jury representative of the community and drawn from a random sample of the community.

The Constitution guarantees, not a trial by those interested in voting or serving on juries, but a jury drawn from the entire community, including the apathetic, the disillusioned, the selfish, and the lazy.

CONCLUSION

Petition for Writ of Certiorari to the Tenth Circuit should be granted on the question of whether the use of voter registration lists for the selection of juries in the Federal Courts as authorized by the Jury Selection and Service Act of 1968 violates the Fifth Amendment to the Constitution of the United States because it excludes a disproportionate number of Blacks and low income workers.

Respectfully submitted,

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701
Counsel for Petitioners

December, 1971

CERTIFICATE OF COUNSEL

This is to certify that the foregoing Petition for rehearing is submitted in good faith and not for the purpose of delay and is restricted tc the grounds specified in Rule 58(2).

STEPHEN JONES
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, STEPHEN JONES, Counsel for Petitioners, do hereby certify that all parties required to be served have been served a copy of the foregoing Petition for Rehearing on this ____ day of December, 1971. The following Counsel for Respondent,

Honorable Erwin N. Griswold
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

and

Mr. William R. Burkett
United States Attorney
4434 Federal Courthouse Building
Oklahoma City, Oklahoma 73102,

have each been mailed three (3) true and correct copies thereof, first class postage prepaid, this ____ day of December, 1971.

STEPHEN JONES
Counsel for Petitioners

APPENDIX A

FILED
Oct. 7, 1968
VERA L. HOWARD
Clerk, U. S. District Court
By JOSEPHINE P. GORE
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Miscellaneous Number 9

PLAN FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

Pursuant to the Jury Selection and Service Act of 1968 (Public Law 90-274), the following plan is hereby adopted by this Court.

The Court has considered parts of the district from which jurors should be selected for the places where court is held, and finds that a designation of the counties from which jurors will be drawn for each place of holding court will result in impartial trials and at the same time avoid incurring unnecessary expense and unduly burdening citizens of any part of the district with jury service. For this purpose there shall be four divisions as follows:

1. *Oklahoma City, Guthrie, Chickasha, Pauls Valley and Shawnee Division*: Blaine, Canadian, Cleveland, Garvin, Grady, Kingfisher, Lincoln, Logan, McClain, Oklahoma and Pottawatomie Counties.

2. *Enid and Ponca City Division*: Alfalfa, Garfield, Grant, Kay, Noble and Payne Counties.

3. *Lawton and Mangum Division*: Beckham, Caddo, Comanche, Cotton, Greer, Harmon, Jackson, Jefferson, Kiowa, Stephens, Tillman and Washita Counties.

[APPENDIX]

4. *Woodward Division*: Beaver, Cimarron, Custer, Dewey, Ellis, Harpter, Major, Roger Mills, Texas, Woods and Woodward Counties.

This plan shall apply separately to each place of holding court designated herein, except that Oklahoma City, Guthrie, Shawnee, Chickasha and Pauls Valley shall have the same jury wheel; Enid and Ponca City shall have the same jury wheel; Lawton and Mangum shall have the same jury wheel and Woodward a jury wheel.

The Clerk of the Court shall manage the jury selection process under the supervision and control of the Chief Judge or in his absence, any other Judge of the District Court.

Voter registration lists represent a fair cross section of the community in the Western District of Oklahoma. Accordingly, names of grand and petit jurors serving on or after December 23, 1968, shall be selected at random from the voter registration lists of all the counties within the district. The selection shall be accomplished by drawing a starting number by lot from fifty numbers and that number shall be selected from the voter registration list of each county along with each 50th number thereafter. The Clerk is authorized to accept the voluntary assistance of the Secretary of any County Election Board in accomplishing the requirements of this paragraph, provided such Secretary certifies that the names furnished were selected in the manner herein prescribed.

The Clerk shall maintain a Master Jury Box for each of the four divisions for holding court. The names of all persons randomly selected from the voter registration lists of the counties in each division shall be placed in the Master Jury Box for that division. The minimum number of names placed initially in these Master Jury Boxes shall be as follows:

1. *Oklahoma City, Guthrie, Shawnee, Chickasha and Pauls Valley Division.* Six Thousand Nine Hundred names.

2. *Enid-Ponca City Division.* One Thousand Seven Hundred names.

3. *Lawton-Mangum Division.* Two Thousand names.

4. *Woodward Division.* One Thousand names.

Any Judge of this District may under provision of this plan order additional names to be placed in the Master Jury Boxes from time to time when necessary. The Master Jury Boxes shall be filled in 1968 as provided by this plan and emptied and refilled between July 1, 1972 and November 1, 1972, and every fourth year thereafter. If for any reason approved by one of the Judges of this District the Master Jury Boxes are not emptied and refilled within the time herein provided, the current Master Jury Boxes shall continue to serve until they are properly refilled as herein provided.

The Clerk from time to time as ordered by the Court, shall publicly draw at random from the Master Jury Boxes the names of as many persons as may re required to maintain at least 600 names in the Qualified Jury Wheel in the Oklahoma City, Guthrie, Shawnee, Chickasha and Pauls Valley Division and 300 names in the Qualified Jury Wheels in each of the other three divisions. The Clerk shall prepare an alphabetical list of the names drawn from each Master Jury Box which lists shall not be disclosed to any person except by order of the Court.

The Clerk shall mail to each person whose name is drawn from a Master Jury Box a juror qualification form with instructions to fill out and return the form, duly signed and sworn to, to the Clerk by mail within 10 days in order to elicit the information necessary to determine whether a person is qualified for, exempt from, or excused from jury service.

The District Court hereby finds that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme incon-

venience to the members thereof, and the excuse of such members will not be inconsistent with the Act, and shall be granted upon individual request:

(1) Persons over 70 years of age.

(2) Actively engaged members of the clergy.

(3) Women who have legal custody of a child or children under the age of 10 years.

(4) Actively practicing attorneys, physicians, dentists, and registered nurses.

(5) Persons who have served as a grand or petit juror in a state or federal court within the past two years.

(6) School teachers in public, parochial or private schools actively teaching.

(7) Sole proprietors of businesses.

(8) Any person who resides more than 150 miles from the place of holding court if called to serve on a petit or grand jury.

The District Court hereby finds that exemption of the following groups of persons or occupational classes is in the public interest and would not be inconsistent with the Act, and accordingly members of such groups are exempted from jury service:

(1) Members in active service in the Armed Forces of the United States.

(2) Members of the fire or police departments of any State, district, territory, possession or subdivision thereof.

(3) Public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory or possession or subdivision thereof, who are actively en-

gaged in the performance of official duties. Public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

The Chief Judge, or any other Judge of the Court, on his initiative or upon recommendation of the Clerk, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The Clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical lists of names drawn from the Master Jury Boxes. If a person does not appear in response to a summons, such fact shall be noted on said list.

In making such determination the Chief Judge, or any other Judge of the Court, shall deem any person qualified to serve on grand and petit juries in the District Court *unless* he or she—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal Court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

[APPENDIX]

The Clerk shall maintain a separate Qualified Jury Wheel for each division within the District and shall place in such wheels the names of all persons drawn from the Master Jury Boxes and not disqualified, exempt, or excused pursuant to this plan. He shall insure that at all times at least the minimum number of names are contained in each wheel as herein provided.

The Clerk shall publicly draw at random from the Qualified Jury Wheel such number of names of persons as ordered by the Court for petit jury panels and prepare a list of the names drawn. Grand jurors shall be publicly drawn proportionately from each of the four Qualified Jury Wheels as ordered by the Court. Until they have been impaneled in open court, the names of persons summoned for grand or petit jury service shall not be made public unless a judge of this court shall otherwise direct.

The Clerk shall issue summonses directed to the persons so drawn and deliver them to the Marshal for service by certified mail, return receipt requested. The Marshal shall attach to his return of service the addressee's receipt.

When there is an unanticipated shortage of available petit jurors drawn and summoned from the Qualified Jury Wheel, the Court may require the Marshal to summon a sufficient number of petit jurors selected at random from available citizens listed on voter registration list in the manner ordered by the Court who are by the Court found to be qualified.

The names of persons drawn for use in the trials of civil actions and criminal actions shall be placed in the courtroom jury box from which the Clerk or Deputy Clerk shall draw at random the names of persons to make up the trial panel. The names of persons drawn for the trial of a case who may be excused for any reason shall be placed back in the courtroom jury box, as well as the trial panel after it has completed the trial of a case. The procedure is

repeated for each subsequent case tried at each session of court.

Dated this 8th day of July, 1968.

s/ Steven S. Chandler
United States District Judge

s/ [illegible]
United States District Judge

s/ Fred Daugherty
United States District Judge

s/ Luther B. Eubanks
United States District Judge

s/ Ross Rizley
United States District Judge

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

A. L. and VIVIAN T. DOWELL	)	
	)	
Petitioners	)	
—v—	)	NO: 71-393
	)	
UNITED STATES OF AMERICA	)	
	)	
Respondent	)	

AFFIDAVIT

STATE OF OKLAHOMA	)	
	)	
COUNTY OF OKLAHOMA	)	ss

A. L. Dowell and Vivian T. Dowell of lawful age, being first duly sworn, state upon their oath as follows:

[APPENDIX]

We are the petitioners in the above styaled matter. At our trial in the District Court in Oklahoma City we requested our attorney, Archibald Hill to make an objection to the composition of the jury and the method of the selection of the jury in the Western District of Oklahoma.

On Friday, December 10, 1971, both Mr. Hill and Mr. Robert B. Milsten, one of our other attorneys, told A. L. Dowell that such objection had been made by Mr. Hill at a conference at the bench with the Court. Mr. Milsten was fairly certain this happened, but not as positive as Mr. Hill who was very certain he had made this objection. Mr. Hill promised to give us an affidavit to this effect, but has not done so, despite repeated requests. The conversation between Mr. Hill and A. L. Dowell was overheared by Mr. Stephen Jones, another one of our attorneys who had also executed an affidavit to this effect.

s/ A. L. Dowell, O.D.
A. L. Dowell

s/ Vivian T. Dowell, D.D.S.
Vivian T. Dowell

Subscribed and sworn to before me this 15th day of December, 1971.

s/ David Montroy
Notary Public

[seal]

My Commission Expires July 17, 1975.

APPENDIX C

AFFIDAVIT

STATE OF OKLAHOMA)
COUNTY OF GARFIELD)

Stephen Jones, of lawful age, being first duly sworn states as follows:

I am a member of the Bar of the State of Oklahoma and of this Court. I was retained by the petitioners, Doctors A. L. and Vivian T. Dowell to represent them in proceedings before the United States Supreme Court.

In early December, 1971 I had several conversations with Mr. Robert B. Milsten, an attorney, who along with Archibald Hill and James W. "Bill" Berry represented the petitioners at the trial on charges of income tax evasion. Mr. Milsten told *he* that it was his best memory and recollection that Attorney Hill made an objection to the Court at the time of the jury selection that the composition and method of selection of the jury was in violation of the Constitution of the United States in that the method of selection excluded Blacks. He indicated to me that Mr. Fred Pericaval, an accountant who was also present for the trial was of the same opinion that an objection had been made. Mr. Milsten later confirmed his recollection in writing to me. On December 10, 1971, I conferred by telephone with Mr. Hill who told me, in the presence of Dr. Dowell, that he had made such an objection and would give me an affidavit to that effect. Mr. Milsten, in a conversation I had with him on or about December 13, confirmed that Mr. Hill had also told him that this objection was made. I then discussed this matter with Mr. Berry, the third attorney, and he told me that he was unable to remember whether the objection was made or not, but that it had been agreed that should such an objection be made, Mr. Hill would make it. I have searched the transcript for a record of the

objection but find none. However, the record does reflect some proceedings out of the presence of the jury and does not include some other proceedings during the trial. It is therefore quite possible that the court reporter did not pick up the objection, especially if it was made—as Mr. Hill and Mr. Milsten remember, out of the hearing of the jury and at the bench in a conference with the Court. Mr. Milsten's remembrance of the incident was not as definite and certain as that relayed to me by Mr. Hill.

s/ Stephen Jones

Subscribed and sworn to before me this 20th day of December, 1971.

s/ Shirley Ann Pope
Notary Public

[seal]

My Commission Expires December 27, 1972.